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Universiti Utara Malaysia v Mutiara bt Mohamad & Ors

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22–349 OF 2007
SEE MEE CHUN JC
20 FEBRUARY 2011

Administrative Law — Exercise of administrative powers — Domestic discipline — Dismissal of lecturer by University Utara Malaysia ('UUM') — Breach of PhD sponsorship agreement by lecturer — Failure by lecturer to report for work upon completion of studies — Whether disciplinary proceedings properly carried out pursuant to Statutory Bodies (Discipline and Surcharge) Act 2000 — Whether disciplinary procedure under Universities and University Colleges Act 1971 should have been used instead — Whether UUM a statutory body or body corporate — Whether disciplinary committee committed procedural impropriety — Whether dismissal proper

Labour Law — Employment — Dismissal — Dismissal of lecturer by University Utara Malaysia (UUM) — Breach of PhD sponsorship agreement by lecturer — Failure by lecturer to report for work upon completion of studies — Whether disciplinary proceedings properly carried out pursuant to Statutory Bodies (Discipline and Surcharge) Act 2000 — Whether disciplinary procedure under Universities and University Colleges Act 1971 should have been used instead — Whether UUM a statutory body or body corporate — Whether disciplinary committee committed procedural impropriety — Whether dismissal proper

The plaintiff, Universiti Utara Malaysia ('UUM'), sought damages arising from breach of an agreement dated 22 August 1997 ('the agreement') which was entered into between UUM and the defendants. Pursuant to the agreement, UUM was to sponsor the first defendant ('D1') a lecturer in a PhD programme and the second ('D2') and the third defendants ('D3') were the guarantors. D2 and D3 had since passed away. On 2 August 1997 D1 was granted study leave for a period of 36 months ending on 1 September 2001 and subsequently extended to 1 August 2002. In 2002 she was asked to sign a letter of undertaking (*aku janji*). Vide letter dated 31 October 2003 (P6) she was instructed to report for work dengan *kadar segera* which letter stated her leave had ended on 1 June 2003. By letter dated 17 March 2004 D1 was issued a letter to show cause as to why disciplinary action with a view to dismissal or reduction in rank should not be taken against her. This was on account of her failure to sign the *aku janji* and report for work. She sent two letters dated 5 September 2004 for extension of her no pay leave until September 2006 and clarification on *aku janji*. Disciplinary proceedings proceeded and the

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disciplinary committee of the Management and Professional Group (No 1) ('disciplinary committee') in its meeting of 7 December 2004 dismissed her with effect from 8 December 2004. D1 counterclaimed for a declaration that the dismissal was null and void and of no effect and sought damages in terms of salary and allowances. The disciplinary proceedings leading to D1's dismissal was carried out pursuant to Statutory Bodies (Discipline and Surcharge) Act 2000 (' Act 605'). UUM contended that Act 605 applied to it by virtue of it being a statutory body and it had not been excluded from the application of that law. D1 contended otherwise and said that UUM was not a statutory body but a body corporate and UUM at that time was governed by Universities and University Colleges Act 1971 [Act 30] insofar as disciplinary matters were concerned.

Held, allowing the plaintiff's claim and dismissing D1's counterclaim with costs:

(1) The disciplinary authority established under Act 605 and Act 30 is different. As provided by Act 30 UUM is a body corporate, a distinct entity with a legal personality separate from the members constituting it. As envisaged by s 7 of Act 30, the chancellor, the vice chancellor and members of the board and senate shall be deemed to have been constituted a body corporate. This does not however mean it cannot also be a statutory body within the meaning of Act 605. In essence a statutory body refers to the manner in which the body is created, ie by statute, whereas a body corporate refers to what has been created ie the university. It would fall within the meaning of 'statutory body' in Act 605. UUM was created by a federal law in the form of Act 30 thus making it a statutory body (see paras 10–12).

(2) All matters on discipline of officers of federal statutory bodies including that of UUM were to be in accordance with Act 605. With the commencement of Act 605 on 1 November 2000, s 16A of Act 30 was to cease to apply. UUM's disciplinary proceedings against D1 pursuant to Act 605 were thus in order (see para 15).

(3) There had been procedural impropriety by the disciplinary committee in not considering the following factors: (i) failure of the vice chancellor to explain the contents of the *aku janji* as required by para 9 of *Pekeliling Perkhidmatan Bilangan 17 Tahun 2001- Penguatkuasaan Surat aku janji Untuk Pegawai Awam*; and (ii) failure to comply with reg 4(1) of the Statutory Bodies (Discipline and Surcharge) Regulations (the Regulations) which requires any member of the disciplinary committee to declare his interest in the disciplinary proceedings. The vice chancellor was a member of the disciplinary committee and since the matter involved the *aku janji* of which he was required to explain the contents he should have declared his interest (see para 17).

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(4) From 1 June 2003 to 31 October 2003 and then through to 5 September 2004 D1 had been absent without leave and without prior permission for a good one year three months. This constituted absence without leave rendering D1 liable to disciplinary action and the consequences that entail. On this charge there was no procedural impropriety. Hence, the dismissal of D1 on the charge of absence without leave could stand (see para 19).

[Bahasa Malaysia summary

Plaintif, Universiti Utara Malaysia ('UUM'), telah memohon ganti rugi yang timbul daripada pelanggaran perjanjian bertarikh 22 Ogos 1997 ('perjanjian tersebut') yang telah dimasuki antara UUM dan defendan-defendan. Menurut perjanjian, UUM sepatutnya menaja defendan pertama ('D1') seorang pensyarah dalam program Ijazah Doktor Falsafah dan defendan-defendan kedua (D2) dan ketiga (D3) merupakan penjamin-penjamin. D2 dan D3 telah pun meninggal dunia. Pada 2 Ogos 1997 D1 telah dibenarkan cuti belajar bagi tempoh 36 bulan yang berakhir 1 September 2001 dan kemudian telah dilanjutkan kepada 1 Ogos 2002. Pada tahun 2002 dia telah diminta untuk menandatangani surat *aku janji*. Melalui surat bertarikh 31 Oktober 2003 (P6) dia diarahkan untuk melaporkan diri bertugas dengan *kadar segera* yang mana surat itu menyatakan cutinya telah berakhir pada 1 Jun 2003. Melalui surat bertarikh 17 Mac 2004 D1 telah mengeluarkan surat tunjuk sebab tentang kenapa tindakan tatatertib dengan niat memecat atau menurunkan pangkat tidak patut diambil terhadapnya. Ini adalah berasaskan kegagalannya menandatangani *aku janji* dan melapor diri bertugas. Dia telah menghantar dua pucuk surat bertarikh 5 September 2004 untuk lanjutan cuti tanpa gajinya sehingga September 2006 dan penjelasan tentang *aku janji* itu. Prosiding tatatertib diteruskan dan Jawatankuasa Tatatertib Kumpulan Pengurusan dan Profesional (No 1) ('jawatankuasa tatatertib') dalam mesyuaratnya pada 7 Disember 2004 telah memecatnya bermula pada 8 Disember 2004. D1 telah menuntut balas untuk deklarasi bahawa pemecatan itu terbatal dan tak sah dan tidak berkuat kuasa serta memohon ganti rugi untuk gaji dan elaun. Prosiding tatatertib yang membawa kepada pemecatan D1 telah dilaksanakan menurut Akta Badan Berkanun (Tatatertib dan Surcaj) 2000 ('Akta 605'). UUM berhujah bahawa Akta 605 terpakai oleh sebab ia sebuah badan berkanun dan tidak dikecualikan daripada pemakaian undang-undang tersebut. D1 berhujah sebaliknya dan menyatakan bahawa UUM bukan badan berkanun tetapi badan korporat dan UUM pada masa itu dikawal oleh Akta Universiti dan Kolej Universiti 1971 ('Akta 30') setakat mana perkara berhubung tatatertib adalah berkaitan.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas D1 dengan kos:

(1) Pihak berkuasa tatatertib yang ditubuhkan di bawah Akta 605 dan Akta

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30 adalah berbeza. Sebagaimana yang diperuntukkan oleh Akta 30 UUM adalah badan korporat, entiti yang berbeza dengan keperibadian perundangan yang berasingan daripada ahli-ahli yang membentuknya. Sebagaimana yang dinyatakan oleh s 7 Akta 30, canselor, naib canselor dan ahli-ahli lembaga dan majlis senat hendaklah dianggap badan korporat. Ini bagaimanapun tidak bermaksud bahawa ia bukan badan berkanun dalam maksud Akta 605. Pada asasnya badan berkanun merujuk kepada cara badan itu dibentuk, iaitu oleh statut, manakala badan korporat merujuk kepada apa yang telahpun dibentuk, iaitu universiti. Ia terangkum dalam maksud 'badan berkanun' dalam Akta 605. UUM telah dibentuk oleh undang-undang persekutuan dalam bentuk Akta 30 dengan itu menjadikannya badan berkanun (lihat perenggan 10–12).

(2) Semua perkara berhubung tatatertib pegawai badan berkanun persekutuan termasuklah UUM hendaklah menurut Akta 605. Dengan bermulanya Akta 605 pada 1 November 2000, s 16A Akta 30 tidak lagi terpakai. Prosiding tatatertib UUM terhadap D1 menurut Akta 605 dengan itu adalah teratur (lihat perenggan 15).

(3) Berlaku penyalahgunaan prosedur oleh jawatankuasa tatatertib kerana tidak mengambilkira faktor-faktor berikut: (i) kegagalan naib canselor untuk menjelaskan kandungan *aku janji* itu sepertimana dikehendaki oleh perenggan 9 Pekeliling Perkhidmatan Bilangan 17 Tahun 2001-Penguatkuasaan Surat *aku janji* Untuk Pegawai Awam; dan (ii) kegagalan mematuhi peraturan 4(1) Peraturan-Peraturan Badan Berkanun (Tatatertib dan Surcaj) ('Peraturan tersebut') yang menghendaki mana-mana ahli jawatankuasa tatatertib menyatakan kepentingannya dalam prosiding tatatertib. Naib canselor merupakan ahli jawatankuasa tatatertib dan oleh kerana perkara tersebut melibatkan *aku janji* yang mana beliau dikehendaki menjelaskan kandungannya maka beliau sepatutnya telah menyatakan kepentingannya (lihat perenggan 17).

(4) Dari 1 Jun 2003 hingga 31 Oktober 2003 dan kemudian sehingga 5 September 2004 D1 tidak hadir tanpa cuti atau memohon kebenaran terdahulu selama satu tahun tiga bulan. Ini membentuk ketidakhadiran tanpa cuti yang menyebabkan D1 boleh dikenakan tindakan tatatertib dan menerima akibat daripada itu. Atas pertuduhan ini tiada penyalahgunaan prosedur. Justeru itu, pemecatan D1 atas pertuduhan tidak hadir tanpa cuti masih kekal (lihat perenggan 19).]

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1037–1098.

For cases on domestic discipline, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 78–79.

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Cases referred to

Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia [1981] 2 MLJ 196 (refd)

Legislation referred to

Statutory Bodies (Discipline and Surcharge) Act 2000 ss 2(1), 5, 6, 7, Reg 4(1), 22, 23

Statutory Bodies (Discipline and Surcharge) Regulation Reg 4(1), 22, 23

Universities and University Colleges Act 1971 ss 6, 7, 16A, 16C, 28, 29

Bahador bin Omar (Bahador Omar & Co) for the plaintiff.

Mohamed Hanipa bin Maidin (Mohamed Hanipa & Associates) for the defendants.

See Mee Chun JC:

[1] Universiti Utara Malaysia ('UUM') as the plaintiff seeks the relief of damages arising from breach of conditions and contract *Perjanjian Belajar Di Bawah Skim Latihan Kakitangan Akademik Dan Pentadbiran* Agreement. The agreement dated 22 August 1997 was entered into between UUM and the defendants. Pursuant to the agreement UUM was to sponsor the first defendant (D1) a lecturer in a PhD programme and the second (D2) and the third defendants (D3) were the guarantors. D2 and D3 have since passed away.

[2] On 2 September 2001 D1 was granted study leave for a period of 36 months ending on 1 September 1997 and subsequently extended to 1 August 2002. In 2002 she was asked to sign a letter of undertaking (*aku janji*). Vide letter dated 31 October 2003 (P6) she was instructed to report for work *dengan kadar segera* which letter stated her leave had ended on 1 June 2003.

[3] By letter dated 17 March 2004 D1 was issued a letter to show cause as to why disciplinary action with a view to dismissal or reduction in rank should not be taken against her. This was on account of her failure to sign the *aku janji* and report for work. She sent two letters dated 5 September 2004 for extension of her no pay leave until September 2006 and clarification on *aku janji*. Disciplinary proceedings proceeded and the disciplinary committee of the Management and Professional Group (No 1) (disciplinary committee) in its meeting of 7 December 2004 dismissed her with effect from 8 December 2004 and she was informed by letter dated 23 December 2004. D1 appealed by letter dated 1 January 2005. The appeal was dismissed and the decision of the disciplinary committee was affirmed by the appeal committee in its meeting of 6 October 2005 and notified to D1 by letter dated 12 October 2005.

[4] D1 counterclaims for a declaration that the dismissal is null and void and

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of no effect and seeks damages in terms of salary and allowances.

BASIS OF UUM'S CLAIM

[5] D1 has submitted UUM's claim is not based purely on breach of contract as it had pleaded in para 11 of the statement of claim the disciplinary committee had legally and validly dismissed D1. I would say that by referring to para 18(a) of the statement of claim the main relief sought by UUM is damages arising from violation of conditions and breach of agreement. Hence the basis of its claim is premised on a breach of contract. However if D1 had not been validly dismissed UUM's claim for breach of contract would not be sustained. The first issue therefore becomes that of whether the dismissal of D1 was valid.

UNDER WHICH ACT SHOULD THE DISCIPLINARY PROCEEDINGS BE CONDUCTED

[6] It is not disputed that the disciplinary proceedings leading to D1's dismissal was carried out pursuant to Statutory Bodies (Discipline and Surcharge) Act 2000 (Act 605). UUM contends Act 605 applies to it by virtue of it being a statutory body and it has not been excluded from the application of that law. D1 contends otherwise and says UUM is not a statutory body but a body corporate and UUM at that time was governed by Universities and University Colleges Act 1971 (Act 30) insofar as disciplinary matters were concerned.

ACT 605

[7] Act 605 came into force on 1 November 2000 vide PU(B) 361/2000. It is a law to provide for matters relating to the discipline of, and the imposition of surcharge on, officers of statutory bodies incorporated by federal law. Section 2(1) states it shall apply to all statutory bodies except those listed in the First Schedule. UUM is not listed in the First Schedule. A statutory body is defined as 'means a body, by whatever name called, incorporated by federal law for the purposes of the Federal Government, but does not include a local authority'. Section 5 then provides the regulations (defined to be those in the Second Schedule) shall apply in respect of the discipline of officers of a statutory body. Section 6 provides the disciplinary authorities for the various categories of officers shall be the disciplinary committees established in accordance with Part I of the Third Schedule. As provided in s 7 the appropriate disciplinary appeal committee is as per Part II of the Third Schedule.

ACT 30

[8] Act 30 provides for the establishment, maintenance and administration

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of universities and university colleges. UUM was incorporated and established pursuant to an incorporation order under s 6. Act 30 provides such higher educational institution so established to be a body corporate. Section 7 provides the effect of suchincorporation order is that such higher educational institution, the chancellor, the vice chancellor and members of the board and senate shall be deemed to have been constituted a body corporate. Section 16A grants to the board of directors of the university disciplinary authority over all its staff, officers and employees and enables the establishment of disciplinary committees. Section 16C is the power of the board to make disciplinary rules. Sections 16A and 16C were subsequently deleted with effect from 1 February 2009 (PU B 40/2009).

[9] It will thus be clear that the disciplinary authority established under Act 605 and Act 30 is different. D1 contends that UUM is a body corporate and not a statutory body such that Act 605 does not apply and therefore the disciplinary proceedings pursuant to Act 605 cannot stand. It is also suggested that even if Act 605 applies it could only have applied upon the deletion of s 16A from Act 30 with effect from 1 February 2009. As the disciplinary proceedings commenced in 2004 they are not valid.

[10] As provided by Act 30 UUM is a body corporate. Essentially a body corporate is a distinct entity with a legal personality separate from the members constituting it. As envisaged by s 7 of the Act 30, the chancellor, the vice chancellor and members of the board and senate shall be deemed to have been constituted a body corporate. This means that together these individuals are recognised as a body corporate. The intention is as spelled out in s 7 itself which is to have perpetual succession; to sue and be sued in its own name; to purchase any immovable and movable property; to sell, lease, exchange or otherwise dispose of any such property and to exercise, discharge and perform all such powers, duties and functions as may be conferred or imposed.

[11] *Halsbury's Laws of England* (4th Ed), 2006 Reissue Vol 9(2) at para 1101 p 635 explains thus:

> A corporation may be defined as a body of persons … or an office … which is recognized by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder for the time being of the office in question.,

and at para 1113 p 643:

> The nature of a corporation may be shown by contrasting it, as legal conception, with the individuals or mass of individuals in which it resides, in law the individual incorporators, or members, of which it is composed are something wholly different from the corporation itself, for a corporation is a legal person just as much as an individual.

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[12] A body corporate is thus a body of persons endowed with a legal personality. In the case of UUM it is the coming together of the chancellor, the vice chancellor and members of the board and senate to constitute the body corporate with the powers as given by law. This does not however mean it cannot also be a statutory body within the meaning of Act 605. In essence a statutory body refers to the manner in which the body is created, ie by statute, whereas a body corporate refers to what has been created ie the university. It would fall within the meaning of 'statutory body' in Act 605 which is defined as 'a body, by whatever name called, incorporated by federal law for the purposes of the Federal Government'. UUM has been created by a federal law in the form of Act 30 thus making it a statutory body.

[13] The Federal Court case of *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196 was cited as an authority that a university incorporated under Act 30 is a body corporate. It is however not authority that a body corporate cannot be a statutory body as well.

[14] Act 605 came into force on 1 November 2000. All matters on discipline of officers of federal statutory bodies including that of UUM were to be in accordance with this law. Section 16A of the Act 30 which vested in UUM board of directors disciplinary authority over its officers was deleted from 1 February 2009. The clear words in s 28 makes it very clear that the incorporating law of the statutory bodies relating to discipline shall cease to apply. Section 28 states as follows:

> 28 Cessation of application of certain provisions of incorporating law
> Upon the commencement of this Act the provisions which relate to discipline … in the incorporating law of a statutory body and all subsidiary legislation made under or pursuant to those provisions shall cease to apply to that statutory body except as provided in section 29.

[15] Section 29 deals with saving and transitional provisions. Hence with the commencement of Act 605 on 1 November 2000, s 16A of the Act 30 was to cease to apply. To construe otherwise would run counter to the language of s 28 that the provisions on discipline of incorporating laws of statutory bodies shall cease to apply upon the commencement of Act 605. It would also defeat the intention of Parliament 'to bring about uniformity of law and procedure in matters relating to the discipline of … officers of federal statutory bodies' as stated in the explanatory statement to the Bill.

UUM's disciplinary proceedings against D1 pursuant to Act 605 were thus in order.

WAS THE DISMISSAL VALID

[16] The second charges against D1 were failure to sign the *aku janji* and to

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report for duty upon expiry of her study leave on 1 June 2003. On both counts a letter to show cause dated 17 March 2004 was issued to which D1 responded by letter dated 5 September 2004.

(a) Failure to sign aku janji

[17] By letters dated 10 August 2002, 27 October 2002 and 18 December 2002 D1 was asked to sign the *aku janji*. This was followed by the show cause and D1's response seeking clarification and giving her reasons for not signing. Although this came so much later and only then in response to the show cause I agree there has been procedural impropriety by the disciplinary committee in not considering the factors below:

(a) failure of head of department (the vice chancellor) to explain the contents of the *aku janji* as required by para 9 of *Pekeliling Perkhidmatan Bilangan 17 Tahun 2001-Penguatkuasaan Surat aku janji Untuk Pegawai Awam*. It is not sufficient for the plaintiff witness 1 (PW1-Dato Latifah bt Hj Hassan, registrar of UUM at the material time) to deny that the head of department had not given such an explanation; and

(b) failure to comply with reg 4(1) of the Statutory Bodies (Discipline and Surcharge) Regulations ('the Regulations') which requires any member of the disciplinary committee to declare his interest in the disciplinary proceedings. The vice chancellor was a member of the disciplinary committee and since the matter involved the *aku janji* of which he was required to explain the contents he should have declared his interest.

(b) Absence

[18] Regulation 22 states that absence' includes a failure to be present for any length of time at a time and place where the officer is required to be present for the performance of his duties. Regulation 23 goes on to state absence from duty without leave or without prior permission without reasonable cause shall render an officer liable to disciplinary action.

[19] On 31 October 2003 UUM had instructed D1 to report for duty immediately as her leave had ended on 1 June 2003. The fact of the matter remains that from 1 June 2003 to 31 October 2003 and then through to 5 September 2004 D1 had been absent without leave and without prior permission for a good one year three months. This constitutes absence without leave rendering D1 liable to disciplinary action and the consequences that entail.

[20] On this charge there was no procedural impropriety to speak of although D1 attacked it by questioning why UUM chose to take disciplinary

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action instead of terminating the contract and suing for breach. It was further submitted that by bringing disciplinary action UUM had acknowledged there was no breach of contract. I find there to be no such acknowledgment as these are two separate matters.

(c) Finding on validity of dismissal

[21] The procedural impropriety was in respect of the charge on *aku janji* and not absence without leave. That being the case and as the disciplinary proceedings were conducted in accordance with the relevant law which is Act 605 the dismissal of D1 on the charge of absence without leave can still stand.

BREACH OF CONTRACT

[22] Clause 1 of the agreement entered into between UUM and D1 required D1 to return to Malaysia immediately upon completion of her studies (para c) to serve UUM (para e). D1 completed her PhD studies in May 2003. This was followed by UUM's letter to her dated 31 October 2003 to report for duty immediately which was not heeded. Although D1 did subsequently request for an extension on 5 September 2004 she had chose to disregard the terms of the agreement in not returning to serve UUM form May 2003 till October 2003 and through to September 2004. In so doing D1 had breached the agreement.

DAMAGES

[23] Arising from the breach of the agreement cl 8(iii) provides if D1 is *dilucutkan jawatannya dalam perkhidmatan*, D1 is to:

> … membayar balik kepada Universiti apabila sahaja wang tunai seperti dalam jadual di dalam Lampiran 1 atau semua wang yang telah dibayar kepada Pegawai atau bagi pihaknya secara gaji, elaun-elaun dan semua wang yang telah dibelanjakan untuk dirinya atau tanggungannya termasuk yuran pengajian, tambang dan pembiayaan lain mengikut mana yang terbanyaknya …

[24] The third plaintiff witness (PW3-Che Norain bt Ahmad, principal senior assistant treasurer UUM) prepared P19 which was the amount spent on D1 for her PhD and which formed the basis of UUM's claim.

[25] In cross-examination she said she did not know the claim that could be made against D1 for breach of contract, P19 was prepared without reference to the agreement and she was not certain as to the amount UUM could claim. She disagreed that P19 was not in relation to a breach of contract or that the

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maximum UUM could claim was RM160,000. It was also her evidence UUM could claim for the salary paid thus far.

[26] In re-examination PW3 said P19 showed the amount spent on D1 and that was the amount claimed. The amount shown in the *Lampiran* was a general figure and not the overall amount.

[27] The essence of PW3 evidence shows P19 to be the amount expended on D1 for her PhD and the amount of RM 160,000 to be a general figure. This is consistent with cl 8 of the agreement. As between the amount of RM502,917.06 which was expended and the amount of RM160,000 as stated in the *Lampiran*, the agreement provides for UUM to claim the larger amount which is precisely what it did. What UUM did was allowed for under the agreement.

CONCLUSION

[28] Based on the reasons as given above, the plaintiff's claim is allowed and D1's counterclaim is dismissed. Costs to the plaintiff. Counsel for both parties have agreed that the decision of this case binds case GS 22–350 of 2007.

Plaintiff's claim allowed and D1's counterclaim dismissed with costs.

Reported by Kanesh Sundrum